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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 633.

E. FIELD WHITE, *Petitioner*,

v.

JOHN J. FITZPATRICK, as Collector of Internal Revenue for the District of Connecticut, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

PETITIONER'S REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION.

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April 10, 1952.

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I.

The respondent concedes that the question here presented "is an important one and there appears to be a difference in basic approach to it between the court below and the Seventh and Third Circuits. See *Skemp* v. *Commissioner*, 168 F. (2d) 598 (C.A. 7th), and *Brown* v. *Commissioner*,

180 F. (2d) 926 (C.A. 3rd), certiorari denied, 340 U. S. 814, in each of which the result was opposite to that reached in the instant case." (Respondent's Brief in Opposition, p. 7).

Nevertheless, the respondent seeks to minimize this basic conflict on the ground of an alleged factual distinction between the instant case and the *Skemp* and *Brown* cases, which purported distinction, interestingly, is discussed in only one sentence of respondent's entire fifteen page brief in opposition. (Respondent's Brief in Opposition, p. 13).

In both the *Skemp* and *Brown* cases, as with the patent in the instant case, the taxpayers transferred properties which they owned to or for the benefit of members of their immediate families. In both the *Skemp* and *Brown* cases, as in the instant case, the patents and real estate were at that time being used by the taxpayers in their respective businesses. In both the *Skemp* and *Brown* cases, as in the instant case, the patents and real estate were thereafter leased to the taxpayer for business use in consideration of enforceable obligations to pay royalties and rentals. In both the *Skemp* and *Brown* cases, as in the instant case, the stipulated royalties and rentals were found by the trial court to be fair and reasonable. Indeed, the *Skemp* case involved an instrument of transfer by the very terms of which the taxpayer expressly reserved the right to lease back the property transferred. It would follow, therefore, as stated by the dissenting judge below (R. 111), that the happenstance that the *Skemp* and *Brown* transfers were to trustees for the benefit of the taxpayer's children or wife rather than to the wife herself "is a distinction without a difference since that bore only on the completeness of the gifts and reasonableness of the royalties and rentals paid, both here shown and found."

Respondent also seeks *now* to explain away the Government's own attempt, at a time when no conflict existed, to obtain certiorari in the *Brown* case on grounds of general importance, merely because "the *Skemp* and *Brown* cases have not to date been followed by other courts." To that

end, respondent cites *W. H. Armston & Co.* v. *Commissioner*, 188 F. (2d) 531 (C.A. 5th); *Shaffer Terminals, Inc.* v. *Commissioner*, 16 T. C. 356, affirmed *per curiam* March 3, 1952 (C.A. 9th); and *Ingle Coal Corporation* v. *Commissioner*, 174 F. (2d) 569 (C.A. 7th).

The *Armston* case involved nothing more nor less than disguised dividend distributions from a corporation to its controlling stockholder as the result of the conveyance of its property to such stockholder at a grossly inadequate price, and the Fifth Circuit there cited the *Skemp* decision apparently without disapproval. Nor did the Tax Court impinge upon the *Skemp* reasoning in its *Shaffer Terminals* decision where the transfer was subject to a continuous option to repurchase, thus failing to divest the transferror of full legal title and ownership.

Finally, in the *Ingle Coal Corporation* case where the same stockholders controlled both the transferror and the transferee corporations, and the royalty exacted from the one corporation to the other was found to be unreasonable, the Seventh Circuit, faced with the opportunity to review, modify or reverse its own *Skemp* decision, declined to do so.

That no Circuits other than the Seventh, Third and Second Circuits have as yet even been called upon to consider the question here involved, which the court below stated "is a rather new one" (R. 107), is no answer to the fact that, at the present writing, a taxpayer in the Second Circuit is accorded exactly the opposite tax treatment from a taxpayer in either the Seventh Circuit or the Third Circuit.

And if, as the respondent again expressly admits, "there is, accordingly, a conflict in basic approach between the decision below and the *Skemp* and *Brown* decisions" (Respondent's Brief in Opposition, p. 13), then consideration by the Court appears to be justified in order to resolve the discrimination presently existing among taxpayers on the basis of fortuitous geographical location as well as to offer guidance to the seven remaining Circuits which have not yet spoken.

II.

The respondent seeks also to assert some undefined "informal and indirect benefits to the transferror arising from the fact that the parties are intimately related". This concept was effectively laid to rest and eliminated as a ground for taxability by the Court's decision in *Helvering* v. *Stuart*, 317 U. S. 154, 168 (1942), wherein Mr. Justice Reed stated:

> " . . . Economic gain realized or realizable by the taxpayer is necessary to produce a taxable income under our statutory scheme . . . The 'non-material satisfactions' (gifts-contributions) of a donor are not taxable as income. *Helvering* v. *Horst, supra.*"

III.

The attention of the Court is also respectfully called to the footnote on page twelve of the respondent's brief. Although the District Court attributed to taxpayer a statement that he "owns the wife", a painstaking examination of the record reveals no such comment, which fact was pointed out in petitioner's brief to the Court below. Thereupon the Court below made no reference to the questioned statement, nor did respondent then attempt to controvert the taxpayer's representations in this particular.

CONCLUSION.

For the foregoing reasons and for the reasons stated in petitioner's original brief it is respectfully submitted that the writ prayed should be granted.

Respectfully submitted,

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April 10, 1952.